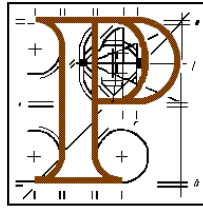


## An Bord Pleanála



### Inspector's Report

**PL 09.EA2005**

#### Development

Description: Request for exemption under Section 172(3) of the Planning and Development Act 2000 from request to produce an EIS for restoration of an existing pre 1963 disused quarry by the importation of inert material in order to restore ground to consistent contours

Address: Donadea, Naas, County Kildare

#### Planning Application

Planning Authority: Kildare County Council.

Applicant: Chris Harrington

Type of Application: Application under Section 172(3) of the 2000 Act as amended.

Date of Site Inspection: 26<sup>th</sup> January 2016

Inspector: **Joanna Kelly**

## 1.0 INTRODUCTION

The applicant is requesting a determination as to whether a notice of exemption under Section 172 (3) of the Planning and Development Act as amended may be granted from a requirement to prepare an EIS for development that comprises of the restoration of an existing pre-1963 disused quarry by the importation of inert material (soil and subsoil only) in order to restore the ground to consistent contours with the adjoining landscape for agricultural use. The development consists of works adjacent to a protected structure, lime kiln.

I note that the applicant appears to be making this request on foot of a determination having been made by the Planning Authority under File Ref. No. 15/148 that the proposed development would be likely to have significant effects on the environment. A note to the applicant in this determination set out that

*“A notice served under Article 103 (1) of the Planning and Development Regulations 2001 as amended, shall cease to have effect where an exemption is granted under Section 172 (3) of the Planning and Development Act 2000-2014.”*

## 2.0 THE APPLICABILITY OF SECTION 172(3)

Section 172(3) of the Planning and Development Act 2000 as amended states as follows:

*(a) At the request of an applicant or a person intending to apply for permission, the Board may, having afforded the planning authority concerned an opportunity to furnish observations on the request, and where the Board is satisfied that exceptional circumstances so warrant, grant in respect of a proposed development an exemption from a requirement of or under regulations under this section to prepare an environment impact statement, except that no exemption may be granted in respect of a proposed development if another member state of a European Community or other state party to the Transboundary Convention, having being informed about the proposed development and its likely effects on the environment in that state, has indicated that it intends to furnish views on those affects.*

*(b) The Board shall, in granting an exemption under Paragraph (a)-*

*(a) Consider whether the effects, if any, of the proposed development on the environment should be assessed in some other form, and*

- (ii) *Make available to members of the public the information relating to the exemption decision referred to under paragraph (a), the reasons for granting such an exemption and the information obtained under any other form of assessment referred to in sub-paragraph (1).*

*The Board may apply such requirements regarding these matters in relation to the application for permission as it considers necessary or appropriate.*

Section 172 (3) (d) also requires that any notice of any exemption granted under paragraph (a) sets the reasons for granting the exemption, and of any requirements applied under paragraph (b) shall, as soon as may be –

- (i) be published in *Iris Oifigiúil* and in at least one daily newspaper published in the State,
- (ii) be given, together with a copy of the information, if any, made available to the members of the public in accordance with paragraph (b), to the Commission of the European Communities.

I draw the Board's attention to the provisions within the legislation as it appears to me that the provision under Section 172 (3) is to provide an exemption from a requirement to submit an EIS. Therefore, a reasonable interpretation would be that an exemption could only be provided where EIA was required in the first instance. Further, there also has to be exceptional circumstances to warrant the granting of the exemption.

In this particular case, the Planning Authority has determined that an EIS is required and issued a notice under article 103 (1) of the Planning and Development Regulations 2001. The Planning Authority has made reference in a note to the applicant about the provisions of section 172 (3) and appear to be suggesting that this is an appeal mechanism for the applicant. However, I consider that the specific wording of this provision is not intended to be used for such but rather provides an exemption mechanism for applications which require EIA but where there are exceptional circumstances to warrant an exemption.

There does not appear to be any guidance issued from the Department in respect of EIA as to what warrants "exceptional circumstances" with regard to this provision. I tend toward the view that an "exceptional circumstance" would need to be something quite remarkable about the circumstances in which someone is seeking an exemption from the requirement to prepare an EIS to warrant such consideration.

Considering the issue of “exceptional circumstance”, I refer the Board to the previously determined applications under section 172 of the Planning and Development Act. There is only one instance where such an exemption has been granted i.e. File Ref. No. 59.EA2001. A copy of this Board Order is attached for ease of reference. In this particular case, it was determined that having regard to (a) the relatively small size of the proposed development (and also its nature and location) and, in particular (b) to the grant of planning permission by the planning authority – subsequent to its decision to require an environmental impact statement in this case – for a larger development on the greater portion of the applicant’s adjacent lands, that the effects of the development on the environment could be adequately assessed on the basis of the information submitted in the context of the planning application and that no other special requirement need apply. In the case of other applications, the Board determined that that there were no exceptional circumstances pertaining to these applications to warrant an exemption from the requirement to prepare an environmental impact statement.

### **3.0 PROPOSAL IN CONTEXT**

The details on file indicate that there is a significant difference in levels between the applicant’s back garden and the quarry pit floor, which poses a significant health and safety risk. The level of fill required is an average of 8.8m with a minimum fill height of 10.3m on the western side. The area of the site to be filled is 1.2 acres approx.

The grounds for the appeal centre around:-

- The scale of the proposed development is considerably below the relevant thresholds set out in Schedule 5 of the Planning and Development Regulations 2001;
- An environmental report based on the criteria set out in Schedule 7 of the Planning and Development Act has been carried out, the findings of which confirm that an EIS is not warranted.
- Sufficient information in the form of expert reports has been prepared and an EIS would be unnecessary and unduly onerous. The consequent time delays associated with making an EIS would neither be justified nor appropriate.

### **4.0 SITE HISTORY**

**File ref. No. 14/1109** I note an application was declared invalid by the Planning Authority as it was not accompanied by an EIS.

## **5.0 PLANNING AUTHORITY ASSESSMENT TO DATE**

The Planning Authority report indicates that formal sub-threshold EIA screening exercise was warranted and having assessed the proposal determined that the development would be likely to have significant effects on the environment.

## **6.0 PLANNING AUTHORITY'S OBSERVATIONS**

In accordance with the requirements of Section 172(3) (a) the planning authority shall be afforded the opportunity to furnish observations in relation to an application for an exemption in the preparation of the EIS. No response to this request has been received.

## **7.0 APPLICANT'S SUBMISSION IN RESPECT OF THE REQUEST**

The current application for exemption under the provisions of Section 172(3) is accompanied by a report which specifically addresses traffic impact; flood risk; architecture and archaeological impact; and ecological impact. The pertinent points in this report are summarised below:-

### **General**

- The volume of fill is approx. 69,000 tonnes.
- The duration of the operation would be 264 days per year over 3 years.
- The proposed number of loads is 4196 per annum or 16 per day.
- The proposal would have a waste intake of 23,000 tonnes which is less than 25,000 tonnes per annum and would therefore be below the threshold for an EIS.
- As the proposal is below the threshold there is a requirement to carry out a case by case examination based on the criteria set out in Schedule 7 of the Planning and Development Regulations.
- Having regard to the comprehensive assessment carried out in the environmental report which is based on the criteria in the 7<sup>th</sup> Schedule it is submitted that EIS is not required in this instance.

### **Traffic Impact Report**

- The report describes the existing roads, and provides details of traffic surveys undertaken on the L10091 on 15<sup>th</sup> September 2015.
- With regard to the proposal it is set out that an additional 2 trips per hour represents less than a 20% increase in traffic generated trips over a 3 year period. It is submitted that there will be no negative impact on the existing public road. Mitigation measures are outlined.

- The report concludes that the development will not have an appreciable impact on the local road network in terms of sightlines, safety or capacity.

### **Flood Risk Assessment**

- The most significant hydrological drainage feature in the general vicinity of the site is the River Blackwater and Baltracey River located approx. 2 km west and east of the site.
- There does not appear to be any drainage channels or connection/runoff from the site towards either river.
- The primary flood risk to the proposed development on site can be attributed to possible pluvial flooding from overland flow, surface water runoff and the adjacent construction site with the main target being Donadea Forest Park.
- Using the OPW website it is submitted that there is no reported incidence of flooding in the vicinity of the site.
- Based on the findings of the screening assessment that has been undertaken and primarily considering the proximity of the Donadea Forest Park to the site and the mapped pluvial flood zone this flood risk assessment is required to proceed to Step 2 – Scoping Assessment.
- Due to the existing and proposed topography of the site and the significant slope of the public road surface water cannot enter the site and therefore the site does not become a ‘pathway’ for surface water.
- It is considered that the nature of surface water runoff from the existing site is negligible and does not exist and the proposed topography and materials will not adversely affect the surface water runoff.
- It is proposed to construct a stone filled, attenuation chamber, surrounded by an appropriate geotextile membrane along the small road frontage of the site, as due to the proposed finished contours of the site, excess surface water, if extremely excessive could enter the public road and help surcharge this previously flooded area.
- The report concludes that there is no primary flood risk to the proposed development that can be attributed to significant pluvial flood events.

### **Archaeological and Architectural Heritage**

- The proposed development is located close to the protected lime kiln which is not within the ownership of the applicant.

- No works are proposed to the Lime Kiln and it is noted that a buffer zone of 5 metres<sup>1</sup> should be provided to avoid any possible accidental damage to the lime kiln and forge.
- An assessment of the impact of the proposed development on structures contained in the National Inventory of Architectural Heritage has been submitted and concludes that there will be no significant impact on these structures in the area.
- With regard to archaeology, the application site is not located in any zone of archaeological potential and as no works are proposed to such a site no mitigation measures are proposed.

### **Ecological Assessment**

- The habitat associated with this overgrown quarry is scrub since more than 50% of the area is covered by shrubs, stunted trees and bramble.
- The hedgerows on either side of the small lane accessing the quarry floor will be filled in and the levels raised to a final level in keeping with the surrounding countryside.
- With regard to bats, all species are present in the general area. However the trees within the proposed development site area offer little potential as bat roosting habitat as they all have a small diameter with no apparent features within which bats could roost.
- A badger sett consisting of two entrances was observed close to the quarry gates. The setts appeared closed in and had no sign of recent use. A letter confirms that badgers were removed from this sett and euthanized as part of the TB eradication programme.
- The soil quality on the quarry floor is presently very poor. With a greater depth of soil allowing proper maturing of trees, higher quality and variety of shrubs and vegetation thereby providing better feeding and nesting sites for fauna can be achieved.
- Careful retention of the treeline along the upper ledge of the quarry will reduce dust emission and noise impact on adjacent habitats.

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<sup>1</sup> The Board should be aware that the report contains a '?' after the 5m. It is unclear if this distance was to be verified or whether the '?' is a typo.

## **8.0 ASSESSMENT**

In this instance the Planning Authority has determined that EIA is required and as such it is not the function of the Board or otherwise to revisit the merits or otherwise of this determination.

The applicant has sought to seek an exemption under section 172 (b) of the Planning and Development Act. Therefore, I consider that the Board is constrained by the considerations of this section of the Act which require that there is “exceptional circumstances” to warrant an exemption.

The applicant has submitted details regarding nature of proposal, traffic, flood risk, archaeology and architectural heritage and ecology. These details are of a general nature which would assist a competent authority in assessing effects of the proposal on the environment. However, in accordance with the requirements of S172, I consider that the applicant has failed to advance any “exceptional circumstance” as to why he should be granted an exemption from the requirement to submit EIA. The provision of this section is not for the Board to determine whether EIA is or is not required but rather determine whether there exists “exceptional circumstance” from such a requirement. I therefore conclude, in this instance that no “exceptional circumstance” exists.

## **9.0 RECOMMENDATION**

Having regard to the specific provisions of section 172 (3) of the Planning and Development Act, as amended, I recommend that the Board refuse to grant the exemption sought under the provisions of this section as there are no exceptional circumstances that exist which warrant an exemption from the requirement to prepare an environmental impact statement in this instance.

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**Joanna Kelly**

**15<sup>th</sup> March 2016**

**Inspectorate**